85-1782

SUPREME COURT, U.S.
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN DePAUW,
Petitioner,

vs.

U.S. INTERNATIONAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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cert pet

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U.S. INTERNATIONAL TRADE COMMISSION,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, John DePauw, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on January 30, 1986. The Respondent is the U.S. International Trade Commission, a federal agency.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Civil Service Reform Act of 1978 as codified in 5 U.S.C. §7701(c)(1) authorizes the use of detailed charges as evidence in meeting the requirement that removal of federal employees must be supported by substantial evidence?

2. Whether performance standards that are not objective "to the maximum extent feasible" as required by the Civil Service Reform Act of 1978, codified in 5 U.S.C. §4302(b)(1), may be used as a basis for removal of federal employees?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the U.S. Court of Appeals for the Federal Circuit are listed in the caption of this case.

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT

The Decision Below Permits Removal of Federal Employees Based on Detailed Charges without Evidence 3

The Decision Below Permits Removal of Federal Employees Based on Performance Standards That Are Not Objective to the Maximum Extent Feasible in Violation of the Civil Service Reform Act 5

CONCLUSION 8

APPENDIX

A Opinion of Court of Appeals A-1

B Decision of the Arbitrator B-1

C Performance Standards C-1

D Relevant Statutes D-1

E Performance Standards and Objective Criteria E-1

TABLE OF AUTHORITIES

Page

John DePauw v. *U.S. International Trade Commission*, 782 F.2d 1564 (Fed. Cir. 1986) 2, 4

Beamer v. *Department of Justice*, AT 07528110881 (1984) 3

Walls v. *Defense Contract Audit Agency*, 9MSPB 684 (1982) 3

Danko v. *Department of Defense*, 5 MSPB 435 (1981) 3

Barnett v. *Department of Interior*, 6 MSPB 19 (1981) 3

Copeland v. *Community Services Administration*, 6 MSPB 239 (1981) 3

Powell v. *Department of Interior*, 3 MSPB 35 (1980) 3

Wells v. *Harris*, 1 MSPB 199 (1979) 5

Wilson v. *Department of Health and Human Services* and *Jackson* v. *Environmental Protection Agency*, 770 F.2d 1048 (Fed. Cir. 1985) 7

OPINION BELOW

The January 30, 1986 opinion of the Court of Appeals for the Federal Circuit, officially cited as 782 F.2d 1564 (Fed. Cir. 1986), appears as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on January 30, 1986. This petition for a writ of certiorari was filed within ninety days from that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.c. 1254(1).

STATEMENT OF THE CASE

This case originated at the U.S. International Trade Commission (USITC). The petitioner, John DePauw, served honorably in the federal service for more than 22 years prior to the beginning of this proceeding. During this period the petitioner earned a doctor's degree in international studies and authored two books on international trade negotiations. Also prior to this proceeding, the petitioner, in April, 1983, was disciplined based on charges of unacceptable job performance in a downgrade action.

On November 4, 1984, the USITC removed the petitioner from the federal service based on charges that his work performance had been unacceptable during the period April 1, 1983 to May 22, 1984,[1] when measured against the job performance criteria established for his position as a GS-11 Commodity-Industry Analyst.

The petitioner continued to deny the charges that his work performance had not met the requirements of his position and took the matter to arbitration under the employees' union

1. The petitioner became seriously ill in May 1984 but was nevertheless removed from his position on November 4, 1984 while still on sick leave under a doctor's care.

USITC collective bargaining agreement rather than appealing the USITC decision to the Merit System Protection Board (MSPB). The arbitration hearing was held on April 15 and 16, 1985, and a decision was rendered on May 4, 1985, American Federation of Government Employees, Local 2211, AFL-CIO and United States International Trade Commission, FMCS case no. 85K07897, denying the petitioner's grievance that he had been improperly removed from his position. The same standards governing MSPB decisions set forth in 5 U.S.C. §7701(c)(1) apply to negotiated arbitration procedures.[2] The petitioner therefore appealed the arbitrator's decision to the U.S. Court of Appeals for the Federal Circuit on the grounds that his removal for unacceptable performance by the USITC was (1) unsupported by evidence before the arbitrator, and based on detailed charges rather than evidence that might show that the charges were true, and (2) was founded on inadequate performance standards that were not objective to the maximum extent feasible as required by 5 U.S.C. 4302(b)(1), leaving both employee and supervisors to subjective guesses as to what quality and quantity of work was required for acceptable job performance.[3] On January 30, 1986, the U.S. Court of Appeals for the Federal Circuit issued its decision affirming the decision of the arbitrator. In its decision, the U.S. Court of Appeals treated the USITC's detailed statement of charges as evidence noting that there was no reason why detailed agency charges could not form part of the proof of the charges.[4] The Court of Appeals although conceding that the performance standards were not as objective as they could have been ("pass muster... though... not with flying colors"),[5] nevertheless said they met the statutory criteria of being objective to the maximum extent feasible

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2. 5 U.S.C. §7121(e)(2); thus under 5 U.S.C. 7703(c) the arbitrator's decision may not stand if it is unsupported by substantial evidence.

3. Other points were raised in the appeal to the U.S. Court of Appeals but only these two issues are raised as part of this petition for a writ of certiorari.

4. *John DePauw* v. *U.S. International Trade Commission,* 782 F.2d 1564 (Fed. Cir. 1986) at 1568.

5. Id. at 1566. (Appendix A to this petition).

because most professional people could understand what they mean and what they require. Thus, the federal questions presented in this petition were timely and properly raised below.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW PERMITS REMOVAL OF FEDERAL EMPLOYEES BASED ON DETAILED CHARGES WITHOUT EVIDENCE

If a federal employee may be removed from his job on the basis of detailed charges without evidence, as the Court of Appeals decision below would authorize, this is a revelation that potentially effects millions of federal employees and their families and is a novel interpretation of the Civil Service Reform Act as codified in 5 U.S.C. §7701(c)(1) that demands review and reversal.

The relevant portion of 5 U.S.C. §7701(c)(1) provides that an agency action removing an employee based on unacceptable performance must be supported by substantial evidence. Nothing in this statutory provision or in the legislative history of the Civil Service Reform Act of 1978 suggests that a new meaning was to be given to the term "evidence," that charges themselves could constitute proof that the charges were true. It is almost axiomatic in law that the mere leveling of charges, no matter how detailed, are not proof of the truth of those charges. The fact that the petitioner was previously disciplined based on other charges of unacceptable performance is not proof that the nearly ten pages of detailed charges leveled in this proceeding are true. The fact that the petitioner's immediate supervisor made charges in an interim appraisal leading to the charges in this proceeding is not evidence that the charges are true. It is well settled under Merit System Protection Board law that charges of unacceptable performance are not evidence.[6] And

6. *Beamer* v. *Department of Justice,* AT 07528110881 (1984); *Walls* v.

yet the decision below cites as evidence both the interim appraisal of the petitioner's supervisor leading to the charges in this proceeding, as well as the charges themselves as evidence of the truth of the same charges.[7]

The only attempt made by the USITC to present evidence in support of the charges of unacceptable performance was through the testimony of the petitioner's second level supervisor. The second level supervisor's testimony consisted only of conclusory statements that he believed the petitioner's work was bad because it needed rewrites and that one work product was too long. If the second level supervisor had knowledge of the truth or falsity of the detailed charges leveled by the petitioner's immediate supervisor, it was not demonstrated in the proceeding below. The petitioner's immediate supervisor was not called by the USITC to testify.[8]

Thus, if the USITC's case is stripped of the charges of unacceptable performance as evidence, the case becomes totally unsupported by evidence and cannot be said to have met the substantial evidence test requirement of 5 U.S.C. §7701(c)(1). The decision below cites no precedent cases for the use of charges as evidence but bootstraps its conclusion by stating that there was no reason why the charges could not be treated as evidence.[9] The decision below is the first to conclude that under the Civil Service Act of 1978, codified in 5 U.S.C. §7701(c)(1), charges of unacceptable performance can be considered evidence of the truth of themselves. This is contrary to Merit

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Defense Contract Audit Agency, 9MSPB 664 (1982); *Danko* v. *Department of Defense,* 5 MSPB 435 (1981); *Barnett* v. *Department of Interior,* 6 MSPB 19 (1981); *Copeland* v. *Community Services Administration,* 6 MSPB 239 (1981); 239 (1981); *Powell* v. *Department of Interior,* 3 MSPB 35 (1980).

7. *John DePauw* v. *U.S. International Trade Commission,* 782 F.2d 1564 (Fed. Cir. 1986) at 1566

8. In sum, the detailed charges by the USITC consisted essentially of allegations that the petitioner failed to dot the "i"s and cross the "t"s more often than his immediate supervisor thought he should.

9. Id., note 4 at 1566. (Appendix A to this petition).

System Protection Board cases, and to common sense. If allowed to stand as a precedent, it will have a broad chilling effect on the rights of federal employees who henceforth would be forced to refute unproven charges. Review of the decision below and of the meaning of the substantial evidence test in 5 U.S.C. §7701(c)(1) is therefore urgent.

THE DECISION BELOW PERMITS REMOVAL OF FEDERAL EMPLOYEES BASED ON PERFORMANCE STANDARDS THAT ARE NOT OBJECTIVE TO THE MAXIMUM EXTENT FEASIBLE IN VIOLATION OF THE CIVIL SERVICE REFORM ACT

5 U.S.C. §4302 requires that each federal agency establish performance standards that are objective *to the maximum extent feasible,* to permit accurate evaluation of job performance. Removal actions based on charges of unacceptable performance may not be taken under 5 U.S.C. §4303 unless the job performance criteria is objective *to the maximum extent feasible.* The Civil Service Reform Act of 1978, as codified in 5 U.S.C. §4302, included the requirement for objective criteria because of frequent criticism that performance ratings under the then existing system were largely subjective. Studies had revealed that more than fifty percent of the performance ratings were subjective.[10] In *Wells* v. *Harris,* 1 MSPB 199 (1979), the MSPB Board noted at 217-18 that the legislative history shows that the Congress intended in 5 U.S.C. §4302 to replace the former performance rating systems which were regarded as useless or ineffective with a more meaningful system that would eliminate the potential for arbitrariness. Both the Office of Personnel Management (OPM) and the General Accounting Office have expressed concern that the Civil Service Reform Act would be implemented by federal agencies with per-

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10. OPM. *Issue Analysis; Effectiveness of the Performance Appraisal System for Non-Merit Pay Employees,* October, 1985.

formance standards that are vague and unobjective.

In 1983, the General Accounting Office issued a report, entitled *New Performance Appraisals Beneficial But Refinements Needed,* stating at p. 28 that standards need to be clearly stated and measurable so that managers and supervisors can make objective, accurate performance appraisals.[11] What the 5 U.S.C. §4302(b)(1) was intended to do, therefore, was not to leave an employee's job retention to the subjective judgment of a supervisor who could interpret how "few" errors would be grounds for dismissal and how "extensive" revisions might have to be to warrant removal.

The OPM guidance to federal agencies in Federal Personnel Manual Chapter 430 (12/1980) advised that performance standards must be based on work outcomes expressed in terms of quality, timeliness or expected results and established so that accurate evaluation could be accomplished based on observable behavior. The OPM also advised that any method used should be objective, relevant, and meaningful.

The standards established by the USITC were not objective to the maximum extent possible whether measured against 5 U.S.C. §4302, the GAO report or the OPM guidance. The first performance standard on which the petitioner's removal was based provided:

> "Usually identifies and anticipates problems...usually meets requirements...reports are substantially complete with few errors and require few extensive changes...."[12]

The second performance standard on which removal was based was no better, containing the same vague words "usually," "few," and "most."

The decision below concedes that the performance standards here were not as objective as they could have been, i.e., were not objective as required by 5 U.S.C. §4302 to the maximum extent

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11. GAO/GGD-83-72; Sept. 14, 1983.

12. The performance standards applicable to the petitioner are set forth in full in Appendix C.

feasible. The Court of Appeals noted at 1566 in its decision that the performance standards "pass muster... though... not with flying colors."[13] Yet the Court stated that "most [professional] people will understand what they mean and what they require."[14] Even if this is true, the standards are highly susceptible to being understood in different ways by supervisors and by employees. On the face of it what is "usual," what constitutes "few" or "most" is in the eyes of the beholder.

Since this is the first case in which performance standards of such vagueness and impreciseness have been adjudicated under the Civil Service Reform Act as codified in 5 U.S.C. §4302, the meaning of this statute, especially as to the words "to the maximum extent feasible," needs further interpretation.[15] Both federal supervisors and employees being rated need to know how 5 U.S.C. §4302 applies to them. The careers of all professional federal employees are at risk if the decision below is allowed to stand.[16]

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13. Id., note 4 at 1566.

14. Id., note 4 at 1566.

15. Although the Court of Appeals referenced the *Jackson* case in *Wilson* v. *Department of Health and Human Services* and *Jackson* v. *Environmental Protection Agency,* 770 F.2d 1048 (Fed. Cir. 1985), which concluded that deficiencies in performance standards could be cured by specific instructions, that case has little relevance here. The petitioner's immediate supervisor did not testify so that there is no evidence that petitioner ever received specific instructions, or if he did, whether they were adequate to cure the deficiencies in the USITC's performance standards. In the absence of such evidence, the Court erred in presuming that such instructions were given and they were adequate to explain what was required in the performance standards by such words as "few," "usually," or "most."

16. A detailed discussion of the history and need for objective performance standards is attached in Appendix E.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Federal Circuit.

Respectfully Submitted,

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301-266-5815

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN DEPAUW,	)	
	)	
Petitioner	)	
	)	
	)	
vs.	)	Appeal No. 85-2451
	)	
	)	
U.S. INTERNATIONAL TRADE COMMISSION,	)	
	)	
Respondent	)	
	)	
	)	

Peter B. Broida, Passman & Broida, of Washington, D.C., argued for petitioner.

Charles H. Nalls, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for respondent. With him on the brief were *Lyn M. Schlitt,* General Counsel and *Michael P. Mabile,* Assistant General Counsel.

Appealed from: U.S. International Trade Commission

JOHN DEPAUW,	)	
	)	
Petitioner	)	
	)	
	)	
vs.	)	Appeal No. 85-2451
	)	(FMCS Case No. 85K/07897)
	)	
U.S. INTERNATIONAL TRADE COMMISSION,	)	
	)	
	)	
Respondent	)	
	)	
	)	

DECIDED: JANUARY 30, 1986

Before DAVIS, BALDWIN and NIES, *Circuit Judges.*

DAVIS, *Circuit Judge.*

Petitioner John DePauw contends that his removal for unacceptable performance by respondent U.S. International Trade Commission (ITC or agency) was grounded in inadequate performance standards, and unsupported by either the evidence before the arbitrator (who upheld the agency's action) or by the arbitrator's own decision. We affirm.

I.

Mr. DePauw was employed in 1970 by the then Tariff Commission (later, the ITC) as a commodity-industry analyst, grade GS-11. After three months he was promoted to GS-12, and the agency considered his performance satisfactory through September 1981. Thereafter, the ITC believed that the quality of his work was declining. For the appraisal period October 1, 1981-June 30, 1982, his performance was rated "minimally acceptable." In November 1982, he received an interim rating of "unacceptable" and he was given 90 days to improve. Petitioner's supervisor continued to be dissatisfied with his work but the upper-level supervisor gave him another opportunity to improve by helping him obtain a reassignment to another division in the ITC's Office of Industries. DePauw agreed to accept a downgrading to grade GS-11.[1]

Some ten months after the reassignment, petitioner's new immediate supervisor issued him (in February 1984) an interim appraisal of "unacceptable." He was given 60 days to improve—a period later extended to 91 days. On May 22, 1984 petitioner went on sick leave and never returned to duty. Toward the end of July 1984, the ITC proposed to remove him for unacceptable performance during the improvement period. His removal was made effective November 9, 1984.

DePauw requested arbitration (in lieu of appealing to the Merit Systems Protection Board). After a hearing, the arbitrator denied the grievance. This appeal followed.[2]

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1. In this position, DePauw was responsible for identifying, developing and maintaining data on assigned products and for interpreting trade data from the standpoint of comparability, classification and competitive factors.

2. The arbitrator is to apply the same substantive rules that the Merit Systems Protection Board (MSPB) would apply. *Cornelius* v. *Nutt,* 53 U.S.L.W. 4837, 4840 (U.S. June 25, 1985). Accordingly, we gauge his decision by the same standards as if the case came here from the MSPB.

II.

Petitioner challenges the objectivity and propriety of the performance standards he was found not to have met. We have recently delved into the general subject of proper performance standards in *Wilson* v. *Department of Health and Human Services* and *Jackson* v. *Environmental Protection Agency,* 770 F.2d 1048 (Fed. Cir. 1985). Under that decision, the standards here involved—as they were applied to this petitioner—pass muster (though perhaps not with flying colors). First, those standards[3] were close parallels to those applicable in *Jackson's* case (*see* 770 F.2d at 1055), similarly governing the work of a professional employee who had to expect to be treated as a professional and whose work necessarily called for some subjective evaluation. The standards here, like those in *Jackson,* "are sufficiently objective and precise in the sense that most (professional) people will understand what they mean and what they require. . ." 770 F.2d at 1055. Second, as in *Jackson's* case, 770 F.2d at 1056, DePauw's superiors filled him in, in detail, as to exactly what was demanded of him. His immediate supervisor after reassignment (Ms. Hagelin) gave him (in her interim appraisal of February 1984) very specific criticisms and a list of what was expected from him. She told him

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3. One standard provided:

Usually identifies and anticipates problems and takes corrective action; usually meets requirements for questionnaire construction and data collection to support project; meets all statutory deadlines and usually meets other deadlines; reports are substantially complete with few errors, and require few extensive changes due to omissions or lack of analysis.

Another stated:

Usually understands most facets of producing a commodity and usually understands economic and market factors operating within a commodity sector; with few major exceptions, non-investigative reports, Summaries of Trade and Tariff Information, trade information monitoring system, correspondence and other output reflect up-to-date data (changing conditions in assigned commodities especially concerning technology, uses, volume of imports and exports, volume of production, and tariff treatment and history) and address economic, trade and tariff issues; output requires few extensive changes in data or content.

that she would be available, at any time during his improvement period, to discuss problems with him and urged him to work closely with her. During that improvement period, both his first and second level supervisors worked with him. With the help of his supervisors' criticism and with the further opportunity to consult with them, petitioner should have known his obligations. The performance standards thus met the statutory criteria.[4]

III.

Another assault on the decision below is that there was no substantial evidence sustaining petitioner's failure to meet the performance standards.[5] In support of the charges, the ITC submitted to the arbitrator (a) documentary evidence consisting of Ms. Hagelin's detailed and specific interim appraisal of petitioner's work (in February 1984) as well as the detailed removal charges found as true by ITC, and (b) oral testimony of Mr. Trezevant (petitioner's upper-level supervisor who was thoroughly familiar with DePauw's case)[6] summarizing with specific examples the low-level of petitioner's work.[7] This combination was enough to make a prima facie case (*Schapansky* v. *Department of Transportation,* 735 F.2d 477, 482 (Fed. Cir. 1984)), which DePauw did not even seek to rebut by introducing any evidence to the contrary. In

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4. We repeat in this case the caution set forth in Part II of *Weirauch* v. *Department of the Army,* Fed. Cir. No. 85-2290, also decided this day.

5. Unacceptable performance is "performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position." *Lovshin* v. *Department of the Navy,* 767 F.2d 826, 834 (Fed. Cir. 1985), quoting 5 U.S.C. § 4301(3).

6. The arbitrator pointed out that Trezevant headed a division with only 17 employees, that he was in close touch with the work of his division, that he was fully prepared to testify in depth about petitioner's work record, and that he was subject to able and searching cross-examination.

7. Ms. Hagelin, the first-level supervisor, was not available at the time of the arbitrator's hearing.

the absence of any rebuttal, the arbitrator could and did accept the ITC's case as sufficient proof. *See Hale* v. *Department of Transportation,* 772 F.2d 882, 885-86 (Fed. Cir. 1985).

DePauw seeks to have us reject the detailed agency charges (accepted by ITC as true) as forming any part of management's valid proof, but there is no reason why the arbitrator must refuse to accept such specific documentary materials[8] which, in this instance, were strongly supported by Ms. Hagelin's interim appraisal and by Trezevant's oral testimony. Nor was it necessary that the ITC produce petitioner's own materials for *de novo* evaluation by the arbitrator. The arbitrator could base his determination on the "overwhelming evidence" (as the arbitrator put it) proffered by ITC. As the arbitrator said:

> The evidence offered as to the [petitioner's] work record subsequent to his transfer to the General Manufacturers Division established that he had displayed a consistently unacceptable level of performance in two of the four critical elements of his postiion. The documentation offered in support of those performance standards shows that his work was replete with errors and numerous deficiencies.

IV.

The last of petitioner's complaints is that the arbitrator did not adequately discuss DePauw's actual performance in the light of the elements of the performance standards he was held to have failed to meet. Although the arbitrator's decision might have been fuller on this precise point, we are satisfied from his entire decision that he canvassed the full record, was aware of the requirements of the performance standards, and understood and accepted the agency's strong proof of petitioner's specific deficiencies. DePauw's failure

8. The letter of charges was not merely conclusory but set forth in great factual detail petitioner's errors and deficiencies; the specifications were so specific that they could be disputed by petitioner, if he desired to do so.

to present rebuttal evidence as those matters made it acceptable for the arbitrator to be as general as he was in his treatment of the uncontradicted ITC evidence.

The decision of the arbitrator is *Affirmed.*[9]

9. Petitioner does not raise before us any claim as to his asserted handicapped condition or as to an alleged conspiracy against him by his supervisors.

Appendix B

In the Matter of
Arbitration Between:

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2211, AFL-CIO	)	
Union	)	
and	)	FMCS Case No. 85K/07897
UNITED STATES INTERNATIONAL TRADE COMMISSION	)	
Employer	)	

Hearing in Washington, D.C., on April 15 and 16, 1985; briefs received from the Union and from the Commission on April 30, 1985.

Arbitrator: *Robert E. Mullin,* selected by the parties through the procedures of the Federal Mediation and Conciliation Services.

Appearances: *For the Union: Peter B. Broida, Esq.,* and *Stanley C. Vass, Esq.,* of *Passman & Broida,* Washington, D.C.

For the United States International Trade Commission: Charles H. Nalls, Esq. With him on the brief: *Lyn M. Schlitt, Esq., General*

Counsel, and *Michael P. Mabile, Esq., Assistant General Counsel,* all of Washington, D.C.

MULLIN, Arbitrator: The Union and the United States International Trade Commission (herein ITC, or, Commission) have had a collective bargaining relationship for some time. The applicable contract during the period in question is operative until December 4, 1985. There is no dispute that this agreement was in effect at all times material herein.

The issues in this case are (1) whether the Grievant, John DePauw, was properly terminated from his position as an International Trade Analyst, grade GS-11, with the ITC by reason of unacceptable performance and (2) whether the Commission failed to provide reasonable accommodation for the Grievant's alleged handicapping condition.

THE FACTS

In 1970, John DePauw, the Grievant herein, first went to work as a GS-11 Commodity-Industry Analyst for the United States Tariff Commission.[1] Within three months thereafter he was promoted to the GS-12 grade level. Pursuant to the Trade Act of 1974, the U.S. Tariff Commission became the United States International Trade Commission. DePauw remained in his position as an analyst and received regular within-grade pay increases, as well as satisfactory performance appraisals through September, 1981.

He was also active in the academic world. He had received a bachelor's degree from Swarthmore College before starting his career with the Federal Government. After his employment with the ITC he received a Master's degree in Soviet studies at American University and later earned a doctoral degree in international studies from that same institution. A book which he published in 1981, *U.S.-Chinese Trade Negotiations,* was well received and

1. Prior to his employment by the Tariff Commission, DePauw had several years of employment with another agency of the Federal Service.

had a very laudatory foreword which was signed by Catherine Bedell, then Chairman of the U.S. International Trade Commission. In 1982, another official of the Commission placed in DePauw's personnel file a highly complimentary letter as to another study which he made during that period.

Thereafter, however, the quality of his work and his productivity began a downward spiral. For the appraisal period from October 1, 1981, to June 30, 1982, when he was in the Minerals and Metals Division, his performance was rated as only "minimally acceptable." In November, 1982, DePauw received an interim performance rating of "unacceptable," and his supervisor notified him that he was being given 90 days to improve his performance. In April, 1983, when the supervisor remained unsatisfied with DePauw's work, his superior began preparing a proposed notice of separation. At that juncture, however, Norris A. Lynch, Director of the Office of Industries, chose to provide DePauw another opportunity to improve his performance. Since, at that point, the Grievant was also complaining that he had personality conflicts with his supervision in the Minerals and Metals Division, with Lynch's help he secured a reassignment elsewhere. This was to a post in General Manufacturers, another division within the Office of Industries. In accepting the reassignment, DePauw voluntarily agreed to a downgrade at the GS-11 level, effective April 4, 1983.

As a GS-11 Commodity-Industry Analyst, DePauw was responsible for identifying, developing and maintaining data on assigned products and for interpreting trade data from the standpoint of comparability, classification and competitive factors. The critical elements of his job classification as Commodity-Industry Analyst at the GS-11 level provided that DePauw:

1. Prepare or assist in the preparation of commodity investigations, analytical reports on findings and special project studies.

2. Develop and maintain technical and economic data on assigned commodities in order to identify and assess trade and tariff issues.

3. Advise division management on international trade matters and domestic industry issues.

4. Clearly and accurately communicate in written and/or verbal presentations.

The performance standards for commodity-industry analysts (now known as international trade analysts) were established in 1981, subsequent to extended consultations with the Union and the employees. There is no dispute that the Grievant was aware of these standards both before he was downgraded and reassigned and after he was transferred to the General Manufacturers Division.

After reassignment to the latter division, DePauw was placed under the immediate supervision of Ms. Edith Hagelin, then Chief of the Instruments and Precision Manufacturers Branch. The Grievant's second-level of supervision then became Walter S. Trezevant, Division Chief of the General Manufacturers' Division. Norris A. Lynch, Director of the Office of Industries, and the third line of supervision over DePauw, had followed DePauw's problems closely. As noted earlier, he was instrumental in arranging for the Grievant's transfer to the new position to which he was assigned in April, 1983. Mr. Lynch gave specific instructions to both Mr. Trezevant and Ms. Hagelin that they were to provide DePauw appropriate assignments and assistance in preparing those assignments as well as evaluations of the quality of his work.

Initially, the Grievant was to have a formal appraisal of his work for the period from April 17 to October 15, 1983. Near the end of that period, however, Ms. Hagelin told him that because of a variety of unusual developments which had occurred during that period, such as inactivity of the commodities for which DePauw was responsible and the short deadlines of division projects, the scheduled supervisorial appraisal of his work would have to be delayed four additional months. Mr. Trezevant testified that it was assumed that this change would provide DePauw with a more complete range of assignments commensurate with his grade and responsibilities, and, hopefully, that it would work to his advantage.

On February 23, 1984,[2] Ms. Hagelin issued an interim performance appraisal covering the previous 10-month period which

2. All dates hereinafter are for the year 1984, unless specifically noted otherwise.

gave DePauw a rating of "unacceptable." The whole report was replete with serious criticisms of DePauw's work. Thus, under Critical Element No. 1—"Prepares or assists in preparation of commodity investigations, analytical reports on findings and special studies," Ms. Hagelin's analysis was severely condemnatory. On this issue, she wrote, in part: "Your compilation of data on production and shipments included more than 90 errors ranging from data reported for one type of product incorrectly tallied by you as a different product, to failure to determine whether responses were in thousands or millions of dollars."

A portion of the report set out DePauw's critique of a bill then pending in the U.S. Senate. According to Ms. Hagelin's review, DePauw's draft report "did not follow the heading format, words were omitted or misspelled, citations and sources were left out, and the table headings were improper."

Under Critical Element 2, there appears the requirement: "Develops and maintains technical and economic data on assigned commodities in order to identify and assess trade and tariff issues." As to the manner in which DePauw followed this requirement, Ms. Hagelin wrote: "Your first submission did not follow the format provided in the manual. The second submission had many errors." There followed, in Hagelin's critique, over 30 examples of errors which appeared in DePauw's text.

Hagelin's appraisal concluded with a stern warning that DePauw's performance would have to display significant improvement within the succeeding 60 days (later extended to 91 days) and that failure to do so could result in his reduction in grade or removal. At the same time, Ms. Hagelin declared that she would be available at any time to discuss problems he had with any of his assignments and urged that he work with her closely to improve his performance.

On April 3, when DePauw was more than 30 days into what was known as the "opportunity" period, Grievant's attorney requested that the ITC extend the period for improvement by 90 days. In this submission, the attorney stated that the Grievant "acknowledges that he is having difficulties in his job" and explained that he needed the extension to complete a counseling program that he had begun for the purpose of ascertaining whether he had a handi-

capping condition. It is significant that this was the first occasion during the entire period of his performance difficulties that the Grievant suggested that he might have a handicapping condition. The Commission granted a partial extension of time (noted earlier) and supplied the necessary information as to the medical documentation required for a claim as to a handicapping condition.

On about May 22, the Grievant went on sick leave from the ITC and has never returned to duty. On June 5, the Grievant sent to the Commission two letters from physicians, a step which he described in an accompanying note of transmittal as "an initial attempt to justify a claim for a handicapping condition for which the (Trade Commission) must make reasonable accommodation." One was a short statement from Dr. Norman R. Tamarkin. It was dated May 22, and simply stated that the Grievant "has been under my care for several months for treatment of depression and anxiety. Until his condition is improved I have advised him not to return to work." The second letter was from Dr. Alvin Seltzer, an internist and allergist, who stated that since about 1966 he had had the Grievant under his care for increasingly severe migraine headaches. In his discussion of the latter, Dr. Seltzer stated that he felt that "the stress and tension of his (DePauw's) work is contributing somewhat to triggering off these headaches."

In a letter dated June 12, Terry P. McGowan, Director of Personnel for the ITC, answered DePauw's communication which the employee had characterized as his initial attempt to establish that he had a handicapping condition. In his response, McGowan referred to those portions of the Code of Federal Regulations which he had sent to DePauw the preceding April and which described the medical documentation an employee was required to submit in order to establish a handicapping condition. In his letter, McGowan stated that the letters of Drs. Tamarkin and Seltzer did not meet those requirements and that until DePauw supplied the documentation required by regulations which he had cited earlier, the Commission would be lacking the information necessary to determine whether DePauw was handicapped and, if so, whether his condition could be accommodated.

On July 24, the Commission issued its proposal to remove DePauw for continued unacceptable performance during the

period allowed by the Commission for improvements. Between June 5, when DePauw first sent the letters mentioned above to the Commission and July 24 when the ITC issued its proposal to remove him, DePauw had supplied no more medical evidence of any handicap. In a letter dated July 30, Peter B. Broida, Counsel for DePauw, wrote to Trezevant, Chief of the General Manufacturers Division, to announce that henceforth he would be representing the Grievant, and to state that since the case would involve, in part, the presentation of medical evidence concerning a stress-related disability suffered by DePauw, he would need an additional three weeks to obtain medical evidence for use in the preparation of the Grievant's response to the removal action.

In his answer to Counsel for DePauw, Trezevant granted an extension until August 20 for the Grievant's response to the proposed removal action. With reference to the Grievant's claimed handicapping condition for which the Commission might be required to make an accommodation, Trezevant reiterated that the Grievant would be free to submit such medical documentation at any time prior to his removal from employment with the Commission, if such a removal should be effected. Trezevant pointed out, however, that the decision-making process on a possible removal would not be suspended to allow additional time to secure such medical documentation. Trezevant also wrote that DePauw had been supplied, in a letter of April 18, and in another dated June 12, with an itemization of the documents needed to establish a claim to a handicapping condition, along with copies of the relevant sections of Title 5 of the Code of Federal Regulations. It was in correspondence of the above dates that Personnel Director McGowan supplied DePauw's counsel (of that period) with the foregoing information.

In mid-August, DePauw submitted three further statements from physicians from whom he had been receiving treatment. Again, these were addressed to Personnel Director McGowan. One was another statement from Dr. Seltzer which supplemented the earlier one he had submitted on behalf of DePauw in June. In this last statement, Dr. Seltzer reviewed again the diagnosis of DePauw's long standing problem with migraine headaches which he described as "classic" migraine that usually lasted 24 to 48

hours and rendered the patient unable to perform any work during that period. In his letter, Dr. Seltzer further stated that in his judgment the stress and tension which DePauw experienced at his work site had aggravated and contributed to his present condition. With reference to the recommendation of Dr. Tamarkin that DePauw go on sick leave from and after May 22, Dr. Seltzer refrained from any outright endorsement of this advice. However, he did express the view that the patient needed some measure of relief from the stress and tension he was experiencing at his work site.

The second letter was from Dr. Kenneth Marek, of the Department of Neurology at the Johns Hopkins Hospital. Dr. Marek reiterated much of what Dr. Seltzer had written with reference to DePauw's problems as to migraine headaches. He further stated that at that time DePauw was being treated with nifedipine, a study drug which, hopefully, would have a beneficial effect. However, Dr. Marek acknowledged that it was still much too early to reach any conclusions as to its effectiveness. According to the latter, an adequate trial of the study drug would require at least 8 to 10 months additional treatment before he could draw any conclusions as to its effectiveness.

Included with these statements was a brief handwritten note from Dr. Tamarkin as to the individual psychotherapy treatments which he had been giving the Grievant twice weekly. Dr. Tamarkin described the Grievant as a seriously ill man, but stated that with continued treatment DePauw might be able to return to work on a part-time basis and eventually resume full-time duty. He further described the Grievant as a patient who was suffering from "depression, extreme anxiety and great emotional instability," as well as "obsessive behavior" that is "typical of this type of personality and emotional disorder."

Dr. Seltzer thought that stress and tension at DePauw's work site may have aggravated and contributed to his present condition, but the other doctors whose opinions DePauw had solicited did not go that far. In fact, none of the three physicians expressed a professional opinion with respect to DePauw's alleged handicap. As a result, in a letter dated August 27, the Commisson submitted all of the medical documentation which DePauw had provided, to Dr. Thomas A. Mathews, a senior consultant of the Metropolitan

Psychiatric Group, for his study and evaluation. In a report, dated September 4, to Terry P. McGowan, the Commission's Director of Personnel, Dr. Mathews stated that a review of the letters from Dr. Tamarkin provided no useful information since, although he reported symptoms, he made no recognized diagnosis of DePauw's problem, or problems. He agreed with Dr. Seltzer's diagnosis of DePauw's headaches as being migraine, but stated that he could not reach any conclusion as to the treatment which Dr. Marek had prescribed for the Grievant because Dr. Marek had given no list of drugs which were used, their exact dosage or the length of time for which they were prescribed. Consequently, Dr. Mathews stated in his letter that until this information was provided "not a great deal can be said with regard to what may be expected in the future and what appropriate accommodations should be made."

In a letter dated September 20, the Commission requested further medical information from the Grievant which Dr. Mathews, as the consulting physician, had recommended that it secure. Thus, since Dr. Mathews had concluded that the statement from Dr. Tamarkin as to DePauw's claim of a psychiatric illness did not provide a recognized diagnosis, Dr. Mathews reported that he could make no evaluation of Dr. Tamarkin's conclusions. The Commission also sought more information and data from the Grievant with reference to his migraine headaches. Dr. Mathews advised that while the Grievant's physicians had diagnosed the migraine headache problem, they had not supplied a history of the treatment that they had provided DePauw with such particularity as would enable him to evaluate their conclusions. Accordingly, the Commission requested that more information of that nature be supplied by the Grievant.

In a letter, dated October 12, the Grievant, through his Counsel, responded to the foregoing request of the Commission. The letter had no further information from Dr. Seltzer who was unavailable at that time because of illness. An additional statement was secured, however, from Dr. Tamarkin, the psychiatrist. In this communication, Dr. Tamarkin stated that the Grievant suffers from a "severe obsessive compulsive personality disorder." The psychiatrist proposed that DePauw be reassigned to an office other than the one in which he was then working where he could be with

"individuals to whom he harbors no suspicion or anxiety," and that an office be selected for this reassignment which will permit him to "meaningfully employ his skills."

The new material which the Grievant provided was submitted by the Commission to Dr. Mathews for his further study. After completing his review of both the new statements from the Grievant's physicians, Dr. Mathews concluded that the Grievant's psychiatric evidence was still inadequate. Very significantly, Dr. Mathews thereafter reached the conclusion that "there is no medical basis to conclude that the suggested accommodation of reassignment would improve the unacceptable level of Mr. DePauw's performance to an acceptable level."

At the hearing, Division Chief Walter Trezevant testified that before he reached a conclusion as to the disposition which he should make in the case involving DePauw, he studied all the documents which the Grievant had submitted, as well as those which Ms. Hagelin had provided. From this study he decided that the instances of unacceptable performance described in the proposal to remove were fully supported by the evidence. According to the Division Chief, thereafter he carefully reviewed the information presented as to the Grievant's medical condition, including the evaluations which were secured from Dr. Mathews, the Commission's medical consultant. Mr. Trezevant testified that after a full consideration of all aspects of the case, he determined that no reasonable accommodation could be provided for the Grievant. He further testified that, as a result, he thereupon separated John DePauw from employment in the Federal Service, effective November 9, 1984.

On December 26, 1984, Lorin L. Goodrich, Director, Office of Administration, issued his final decision on behalf of the Commission wherein he denied the grievance of John DePauw on the ground that the employee had failed to prove his charges that the agency acted improperly. The Grievant thereafter requested arbitration which resulted in the present proceeding.

CONCLUDING FINDINGS

The Commission put two witnesses on the stand, Mr. Walter S.

Trezevant, Chief of the General Manufacturers Division, and Mr. Norris A. Lynch, Director of the Office of Industries. These were the second and third levels of supervision over the Greivant. Ms. Edith Hagelin, the first level of supervision and the Grievant's immediate supervisor, was not available during the hearing and was not called to testify.

Counsel for the Grievant contends that without the testimony of Hagelin, the record lacks any probative evidence which would sustain the Commission's charges against the Grievant. There are several answers to this argument. First, the record is not lacking in probative evidence on the issues in this case. There were the two management witnesses whose testimony was credible, uncontradicted and undenied. And second, there was a substantial body of documentary evidence offered by the Commission which was received, either as joint exhibits of the parties, or at least, without objection.

Mr. Trezevant was the head of a division, but it was not a large, sprawling arm of an enormous Federal Agency. There were only 17 employees and supervisors in the General Manufacturers Division at the time in question and Trezevant himself was one of that number. Chief Trezevant was in close touch with the work of his entire division as well as with all the employees under him. This was borne out when he was a witness and was subjected to an able and searching cross-examination by Counsel for the Grievant. He was fully prepared to testify in depth about the Grievant's work record and did so, credibly and at great length. Mr. Lynch, Director of the Office of Industries, was at the third level of supervision and not as close to the everyday scene as Division Chief Trezevant. However, he knew the Grievant well and had demonstrated a friendly and fatherly concern about DePauw's problems on the job over a long period of time. When DePauw became dissatisfied with the Minerals and Metals Division, it was Director Lynch who arranged his transfer to the General Manufacturers' Division. Mr. Lynch was well acquainted with the Grievant's record and testified, fully and credibly, about many aspects of it. Other than certain biographical material as to the period prior to the time here in question, the Grievant, in contrast with the Commission, offered no independent evidence whatsoever in support of his case-in-chief, as to his affirmative defense, or as to any rebuttal.

THE HEARING

A large number of exhibits were offered, and received, almost all of them by stipulation of both parties. Two in particular which were not so received were evaluations as to the Grievant's medical problems. These had been prepared by Dr. Thomas A. Mathews, medical consultant to the Commission, from records which the Grievant himself had supplied. Again, Mr. Trezevant was intimately acquainted with these records and had studied them in the course of the review which he made of the Grievant's case prior to the time that he reached the decision that DePauw should be removed. On the basis of his testimony these last described exhibits were received.

Counsel for the Grievant called neither the Grievant nor any other witness to the stand. As a result, the credible testimony of Messrs. Trezevant and Lynch is uncontradicted and undenied. Furthermore, as no testimony was offered on behalf of the Grievant's case, the large volume of documents received in evidence without any objection thereto have a similar standing, there being no countervailing testimony in the record to negate or disprove them.

The Grievant attacks the Commission's decision to remove him on the ground that it is unsupported by substantial evidence. The latter is defined as "that degree of relevant evidence which a reasonable mind, considering the record as whole, might accept as adequate to support a conclusion that the matter asserted is true." 5 C.F.R. § 1201.56(c)(i). The decision to terminate may be supported if there is substantial evidence in the record which demonstrates that the employee who was removed performed unsatisfactorily in one or more of the critical performance elements. *Shuman v. Department of the Treasury,* MSPB Docket No. SE04328410073 (1984). The evidence offered as to the Grievant's work record subsequent to his transfer to the General Manufacturers Division established that he had displayed a consistently unacceptable level of performance in two of the four critical elements of his position. The documentation offered in support of those performance statistics shows that his work was replete with errors and numerous deficiencies. There is, in this record, reason for the Commission to contend, as it does in its brief, that the de-

cision to terminate DePauw was "not merely grounded upon substantial evidence, but, rather based upon overwhelming evidence."

THE ISSUE AS TO PERFORMANCE STANDARDS

Counsel for the Grievant presented other arguments, both at the hearing and in his brief. To these arguments we will now turn. Thus, it is argued that the performance standards applicable to DePauw's position were not objective.

The Grievant contends that the standards applied to him lacked objectivity and that, they are, therefore, defective under 5 U.S.C., Chapter 43, the regulations in connection therewith, and Article XIII of the Collective Bargaining Agreement. However, neither the statute nor the cases support the proposition that performance standards must be completely objective. Under 5 U.S.C. § 4302(b)(1), an agency is required to establish performance standards "which will, *to the maximum extent feasible,* permit the accurate evaluation of job performance on the basis of objective criteria. . . related to the job in question." (Emphasis added.) The Congressional history of this legislation makes it clear that Congress intended agencies to have some degree of flexibility in devising the means of assessing employee performance pursuant to the requirements of the statute. *See* S. Rep. No. 969, 95th Cong., 2d Sess. at 41-42 (1978). Consequently, the MSPB has concluded that the scope of review is limited to determining whether an agency has abused its discretion in establishing the standards at issue so as to harm the employee to whom the standards were applied. *See Leonore R. Siegelman* v. *Department of Housing and Urban Development,* 13 MSPB 27, 29-30 (1983).

The Grievant did not have a routine job on a factory assembly line, where performance ratings would depend on his hourly production of tin cans, or a similar product. His position as an International Trade Analyst did not lend itself to the establishment of judgment-free, numerical standards. The degree of accuracy and the quality of an analyst's work must be judged against the nature and complexity of a given assignment, any guidelines that are available and accepted Commission standards. Finally, as Counsel

for the Commission urges in his brief, "the varying nature of the statutory deadlines and administrative constraints imposed upon the Commission preclude specific enumeration of deadlines for the completion of an analyst's work except on a project-by-project basis."

The Grievant was evaluated under a performance appraisal plan which was approved by the Office of Personnel Management on March 30, 1981. The Grievant never raised any objections to the sufficiency of those standards for his position. From the chronology outlined earlier herein, it is apparent that he was accorded time for his evaluation far in excess of the normal span allowed and, further, that during that period his supervisors provided extensive counseling and assistance to him both before and during the time for improvement which followed the interim unacceptable appraisal. In the light of the OPM's approval of the Commission's appraisal system and the effort set forth by the Grievant's superiors to provide him with every opportunity to secure a satisfactory rating it appears that the approval system was adequate by any standard.

In the light of the record developed in this matter, it is the conclusion of the undersigned, which has been reached sadly and with reluctance, that it was the Grievant's performance on his job, rather than the standards for the performance of that job, which caused his removal.

THE CONSPIRACY THEORY

In the Grievance which was filed at the outset of this matter, and in the argument of Counsel for the Grievant, it was asserted that DePauw was the victim of a plot engineered by his supervisors, who "set him up" for termination. This theory was expounded at some length in a letter dated December 4, 1984, which Counsel for the Grievant sent to the Commission. This letter was received as an exhibit along with numerous other pieces of correspondence. Standing by itself, however, the allegation of a conspiracy which is set forth in this document certainly does not rise to the level of evidence. Division Chief Trezevant credibly denied that there had been any conspiracy on the part of DePauw's supervisors to "set

up" the employee. And, as found earlier, the Grievant did not testify on his own behalf and he called no witnesses of his own. Consequently, it must be, and is now, found that there is no evidence in this record to support the theory that any of the supervisors conspired to bring about the dismissal of the Grievant.

WAS THE GRIEVANT DENIED REASONABLE ACCOMMODATION FOR A DEMONSTRATED HANDICAPPING CONDITION?

Article XXI, Section 5, of the Collective Bargaining Agreement provides:

> If an employee has a handicapping condition, performance related and/or adverse actions will not be effected until the employee has been given a reasonable amount of time to seek counseling, participate in the assistance program, and correct performance and/or conduct deficiencies, provided that the employee is making a diligent effort through the assistance program to ameliorate his/her handicapping condition.

In a letter dated April 3, 1984, Attorney Lynn A. Brenner, then Counsel for the Grievant, wrote to Personnel Director McGowan acknowledging that his client's job performance had been found unacceptable and that the client had been informed that he must show significant improvement within 60 days. Attorney Brenner stated that his client had begun a counseling program and that he needed a 90-day extension of the "improvement" period. In a response dated April 18, Personnel Director McGowan granted a substantial extension of time to the client (although not the full amount requested) and also supplied copies of relevant portions of the Code of Federal Regulations on the subject of what constitutes a handicapping condition and a listing of the medical documents needed to support such a claim.

On May 22, 1984, the Grievant came to his office, announced that he was going on sick leave and never returned to work. As has been found earlier herein, on about June 5, the Grievant sent statements to the Commission's Personnel Office from two of his physicians, one a psychiatrist, and the other an internist. The

former, Dr. Norman Tamarkin, stated that DePauw was suffering from depression and anxiety. The internist, Dr. Seltzer, stated that the Grievant was also suffering from migraine headaches and that he (Dr. Seltzer) believed that the "stress and tension of (DePauw's) work is contributing somewhat to triggering off these headaches."

Later, in September, and after the Grievant had provided further medical statements from his doctors, the Commission submitted this evidence to a physician for his evaluation. On the basis of the judgment provided the Commission by Dr. Mathews, the Commission was satisfied that under established diagnostic procedures, the Grievant was suffering from classic migraine headaches. On the other hand, the information which the Grievant's doctor supplied failed to provide a history of treatment sufficient to support any clear conclusions as to the adequacy of that treatment, the likely results of the treatment or, significantly, whether a reasonable accommodation could be made. Similarly, the statements with respect to the Grievant's headaches also failed to spell out an accommodation for the Grievant's headaches. According to Dr. Mathews, without further information, which the Grievant never supplied, the Commission had no basis for evaluating his request for reassignment.

Dr. Tamarkin, the Grievant's psychiatrist, characterized DePauw as a "seriously ill person" and described him as being "paranoid, suspicious, manipulative and subject to extreme emotional outbursts." This description conforms with the experience of DePauw's superiors at the Commission who found that, notwithstanding any efforts to help him, he harbored suspicions and anxiety toward them. In his final evaluation of the Grievant's medical records, Dr. Mathews concluded that DePauw's primary problem is of a personality disorder, but that there is no medical basis on which to conclude that a reassignment would bring about an improvement.

Mr. Trezevant credibly testified that prior to the time that DePauw went on sick leave in May, 1984, the Grievant rarely took sick leave. In fact, up to the time of his departure on sick leave on May 22, he consistently maintained a high sick leave balance. Moreover, Mr. Trezevant testified that while at work DePauw never complained of any medical problems that would make it impossible for him to perform his duties as an analyst. And he fur-

ther testified that he never saw the Grievant exhibit any of the symptoms later complained of in DePauw's medical submissions. Similarly, Mr. Lynch, who testified that DePauw often dropped in to see him before reporting for work, also testified that he never noted any illness, nor did the Grievant complain to him of any illness or request accommodation. The Commission contends that from these facts, plus the deficiencies in his medical information, the Grievant failed to establish that his physical condition caused his performance problems. There is merit in this position. *See Charles O. Donaldson* v. *U.S. Postal Service,* 11 MSPB 241, 242 (1982). The Commission denies any obligation to accommodate an alleged handicap of which it was not aware and for which it never received sufficient medical justification. In any event, it is the conclusion of the Arbitrator that the Grievant has not proved, on the present record, that the Commission denied him a reasonable accommodation for a demonstrated handicapping condition.

This case was well tried by both Mr. Nalls for the Commission and by Mr. Broida for the Union and the Grievant. Subsequent to the hearing, excellent briefs were submitted by both parties. After a full consideration of the facts set forth above, and the arguments of Counsel, it is the conclusion of the undersigned that the grievance which is central to this case is not supported by substantial evidence.

In its brief, the Commission asserts that it is fully cognizant of the fact that the Grievant is now ill, and that it has already provided him with information on disability retirement. Hopefully, the parties may now explore this prospect in greater depth.

AWARD

In accordance with the above findings, the Arbitrator concludes that the grievance involved herein should be, and it hereby is, DENIED.

Robert E. Mullin
Arbitrator

Dated: May 4, 1985

Appendix C

POSITION: COMMODITY INDUSTRY ANALYST

PERFORMANCE OBJECTIVES AND CRITICAL/REQUIRED ELEMENTS	PERFORMANCE STANDARDS AND EVALUATION CRITERIA
	COMMENSURATE WITH GRADE AND POSITION DESCRIPTION, WITH GENERAL GUIDANCE ON WORK TO BE DONE, METHODS OF ACCOMPLISHMENT, AND GENERAL REVIEW OF FINAL PRODUCT:
Critical Elements 1. Prepares or assists in preparation of commodity investigations, analytical reports on findings and special project studies. (General guidance by Branch Chief includes defining overall objectives, priorities and review).	1. *Commendable* — Consistently identifies and anticipates problems and takes corrective action; demonstrates knowledge of questionnaire construction and ability to satisfy data needs and requirements for industry coverage. Participates in and/or completes nearly all assignments on schedule, and meets all statutory deadlines; reports contain no major errors/omissions, and require little rewrite.

POSITION: COMMODITY INDUSTRY ANALYST

PERFORMANCE OBJECTIVES AND CRITICAL/REQUIRED ELEMENTS	PERFORMANCE STANDARDS AND EVALUATION CRITERIA
Critical Elements — Continued	*Minimally Acceptable* — Usually identifies and anticipates problems and takes corrective action; usually meets requirements for questionnaire construction and data collection to support project; meets all statutory deadlines and usually meets other deadlines; reports are substantially complete with few errors, and require few extensive changes due to omissions or lack of analysis.
2. Develops and maintains technical and economic data on assigned commodities in order to identify and assess trade and tariff issues. (General guidance by Branch Chief includes defining overall objectives, priorities, and review).	2. *Commendable* — Demonstrates technical understanding of the materials and operations required to produce a commodity; demonstrates ability to address economic factors and market characteristics operating within a commodity sector; with few exceptions, non-investigative reports, Summaries of Trade and

POSITION: COMMODITY INDUSTRY ANALYST

PERFORMANCE OBJECTIVES AND CRITICAL/REQUIRED ELEMENTS	PERFORMANCE STANDARDS AND EVALUATION CRITERIA
Critical Elements — Continued	Tariff Information, trade information monitoring system, correspondence and other output reflect up-to-date data (changing conditions in assigned commodities especially concerning technology, uses, volume of imports and exports, volume of production, and tariff treatment and history) and address economic, trade and tariff issues; output requires few changes in data or content. *Minimally Acceptable* — Usually understands most facets of producing a commodity and usually understands economic and market factors operating within a commodity sector; with few major exceptions, non-investigative reports, Summaries of Trade and Tariff Information, trade information monitoring system,

POSITION: COMMODITY INDUSTRY ANALYST

PERFORMANCE OBJECTIVES AND CRITICAL/REQUIRED ELEMENTS	PERFORMANCE STANDARDS AND EVALUATION CRITERIA
Critical Elements — Continued	correspondence and other output reflect up-to-date data (changing conditions in assigned commodities especially concerning technology, uses, volume of imports and exports, volume of production, and tariff treatment and history) and address economic, trade and tariff issues; output requires few extensive changes in data or content.
3. Advises division management on international trade matters and domestic industry issues, (General guidance by Branch Chief includes defining overall objectives, priorities, and review).	3. *Commendable* — Prepares MIBR, trade monitoring reports, and other written and oral analyses on a regular and timely basis; analyses indicate ability to identify significant trade and competitive factors and to distinguish between essential and secondary issues; written material requires little rewrite.

POSITION: COMMODITY INDUSTRY ANALYST

PERFORMANCE OBJECTIVES AND CRITICAL/REQUIRED ELEMENTS	PERFORMANCE STANDARDS AND EVALUATION CRITERIA
Critical Elements — Continued	*Minimally Acceptable* — Above items are prepared on a timely but irregular basis; written and oral analyses usually addresses significant competitive factors and pertinent issues; and written material requires few extensive changes to meet objectives.
4. Clearly and accurately communicates in written and/or verbal presentations. (General guidance by Branch Chief includes defining overall objectives, priorities, and review).	4. *Commendable* — Written material reflects an understanding of data and verification requirements and ensures that analysis and conclusions are supported by data; communication reflects understanding and use of sources of information to include tailormades, IM146, nomenclature and classification systems and world trade data; written and oral output (upward communication) is organized in an understandable manner meeting audience require-

POSITION: COMMODITY INDUSTRY ANALYST

PERFORMANCE OBJECTIVES AND CRITICAL/REQUIRED ELEMENTS	PERFORMANCE STANDARDS AND EVALUATION CRITERIA
Critical Elements — Continued	ments, with few minor exceptions, and responds to audience questions effectively with clarity and definitiveness with few minor exceptions. *Minimally Acceptable* — Written material is usually verified to ensure correct data and support for analysis and conclusions; above sources of information are usually understood and used; written and oral output (upward communication) is organized in an understandable manner meeting audience requirements with few major exceptions and responds to audience questions effectively with clarity and definitiveness with few major exceptions.

POSITION: COMMODITY INDUSTRY ANALYST

PERFORMANCE OBJECTIVES AND CRITICAL/REQUIRED ELEMENTS	PERFORMANCE STANDARDS AND EVALUATION CRITERIA
Required Elements 1. Maintains and expands contacts with key association and industry representatives, and Government representatives relative to industry/commodity assignments. (General guidance by Branch Chief includes defining overall objectives, priorities, and review).	1. *Commendable* — Meets office guidelines for maintaining industry/government contracts; able to respond accurately to inquiries and output reflects significant degree of industry knowledge and current information on industry development. *Minimally Acceptable* — Usually meets office guidelines for maintaining industry/government contacts and usually maintains the ability to obtain information on current industry developments.

POSITION: COMMODITY INDUSTRY ANALYST

PERFORMANCE OBJECTIVES AND CRITICAL/REQUIRED ELEMENTS	PERFORMANCE STANDARDS AND EVALUATION CRITERIA
Required Elements — Continued	
2. Represents the office in Commission, Federal agencies, Congressional, and private sector contacts.	2. *Commendable* — Demonstrates good judgment, preparation, and a professional manner in oral presentation and/or any requested written materials by meeting the needs of the Commission or Government/industry contact as indicated by few instances of minor negative comments. *Minimally Acceptable* — Demonstrates good judgment, preparation, and a professional manner in oral presentation and/or requested written material by meeting the basic needs of the Commission or Government/industry contact as indicated by few instances of major negative comment.

POSITION: COMMODITY INDUSTRY ANALYST

PERFORMANCE OBJECTIVES AND CRITICAL/REQUIRED ELEMENTS	PERFORMANCE STANDARDS AND EVALUATION CRITERIA
Required Elements — Continued 3. Works with others effectively.	3. *Commendable* — Cooperates with fellow employees and participates as a member of a team, sharing responsibility and expertise in developing a product without any disruptive personal conflicts. *Minimally Acceptable* — Cooperates with fellow employees and participates as a member of a team sharing responsibility and expertise in developing a product with few and/or minor personal conflicts.

Appendix D

STATUTES INVOLVED

5 U.S.C. §4301. Definitions.

(3) "Unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position."

5 U.S.C. §4302. Establishment of performance appraisal systems.

(a) Each agency shall develop one or more performance appraisal systems which—

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evalulating each employee during the appraisal period on such standards;
(4) recognizing and rewarding employees whose performance so warrants;
(5) assisting employees in improving unacceptable performance; and
(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

5 U.S.C. §4303. Actions based on unacceptable performance.

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

. . .

(e) An employee who is a preference eligible or is in the competitive and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

5 U.S.C. §7701. Appellate procudures.

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and
(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title [5 USCS §3105] or other employee of the Board

designated by the Board to hear such cases, except than in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title [5 USCS §4303], is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title [5 USCS §2302(b)]; or

(C) shows that the decision was not in accordance with law.

5 U.S.C. §7703. Judicial review of decisions of the Merit Systems Protection Board.

(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or
(3) unsupported by substantial evidence;

Appendix E

PERFORMANCE STANDARDS AND OBJECTIVE CRITERIA*

This appendix incorporates selective pertinent material on unacceptable performance cases which appears to be applicable in the instant case. The purpose of this material is to show the context and importance of performance cases, of which the instant case is but one, to the Federal Civil Service, and indeed to the Public Service Sector, and to argue that the standards applied to the petitioner in the instant case were not objective.

The material which follows is based principally on Broida.[1]

> Although performance actions now constitute less than 10% of the overall workload of the Board, their importance is increasing each year.... In 5 USC 4302-3, Congress established as a principal part of the Reform Act a requirement that agencies make decisions with respect to retention, reassignment, and demotion of employees on the basis of performance in critical elements of their jobs measured on the basis of reasonably objective performance standards. Removal may be predicated upon failure to meet the requirements of just one of a number of critical elements applicable to a position. *Shuman* v. *Dept. of the Treasury,* SE04328410073 (1984); 5 USC 4303. The magic words are "unacceptable performance." In performance based actions, an employee may be removed only for unsatisfactaory performance, not for minimally acceptable performance. *Goodale* v. *Dept. of Labor,* AT04328410243 (6/85). An agency may not take an unacceptable performance action until it has warned the employee of unsatisfactory performance and given him a chance to improve. It is

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* This section was written by John DePauw.

1. Peter B. Broida, *A Guide to Merit Systems Protection Board Law and Practice,* 3rd Edition, 1979-1986, Dewey Publications, Inc., Washington, D.C. 1986.

> insufficient to warn the employee of marginal performance, look for improvement, and not finding it take an unacceptable performance action....
>
> Proof required of the agency is only substantial evidence of unacceptable performance. Given the deference to the agencies with respect to the development of performance standards and critical elements, given the refusal of the Board to apply mitigation standards developed in adverse action cases to unacceptable performance actions, and given the low quantity of proof required of agencies to support unacceptable performance actions, it is natural that these cases will become more frequent and more effective vehicles for removing individuals who cannot or will not perform properly in their assigned positions.

The Supreme Court has not previously reviewed the objectivity of standards applied in Chapter 43 Actions (5 U.S.C. §4302). Thus this case is of the utmost importance because it has implications for millions of federal, state, and local employees.

In *Wells* v. *Harris*[2] *the Board stated:*

> The legislative history shows that Congress intended to provide in Sec. 4302 a more meaningful replacement for the former performance rating systems which were regarded as useless or ineffective; to require a single interrelated framework for performance appraisals under Sec. 4302 in which those appraisals would be the basis for multiple personnel actions including promotions, pay increases and awards as well as adverse actions; and to require that Sec. 4303 actions be based on the results of such appraisal systems. It also shows that Congress was aware of inadequacies in the state-of-the-art for appraising employee performance and the consequent potential for arbitrariness, and sought to protect against those risks by requiring ob-

2. 1 MSPB 199 (1979) at 217-18.

jective performance criteria and careful review by OPM of each appraisal sysem.[3]

....The essential holding of *Wells* is that actions against employees based upon unacceptable performance, decided on the basis of substantial evidence, pursued through procedures identified at 5 USC 4303, may be taken only if an OPM-approved apraisal system is in effect that has been developed under 5 USC 4302.

Further it seems abundantly clear *ipso facto* that an "OPM-approved appraisal system" must include objective standards.

Again, In *Wells:*

The Board emphasized... that because of the lesser evidentiary burden of substantial evidence in section 4303 actions, performance standards and critical elements should be established under circumstances providing adequate safeguards for employees. Congressional concern for these safeguards is apparent in the requirement of section 4302(b)(1) that performance standards will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria. Although OPM does not review the standards, its review is to insure the adequacy of agency regulations defining how agency managers will establish the standards.

Relating the instant case to MSPB decisions the Appeals Court stated that:

"The arbitrator is to apply the same substantive rules that the Merit Systems Protection Board (MSPB) would apply. *Cornelius* v. *Nutt,* 53 U.S.L.W. 4837, 4840 (U.S. June 25, 1985). Accordingly, we gauge his decision by the same

3. Ibid.

standards as if the case came here from the MSPB."[4]

In the instant case the petitioner challenged the objectivity of the performance standards within the meaning of 5 U.S.C. §4302 and 5 U.S.C. §4303. Specifically, according to the lower court, citing *Wilson* v. *Department of Health and Human Services* and *Jackson* v. *Environmental Protection Agency,* 770 F.2d 1048 (Fed. Cir. 1985), they reasoned that under *Wilson,* the standards here involved — as they were applied to this petitioner — "pass muster (though perhaps not with flying colors)." With regard to the U.S. International Trade Commission (ITC), the Appeals Court in its opinion stated that

> One standard provided:
> Usually identifies and anticipates problems and takes corrective action; usually meets requirements for questionnaire construction and data collection to support project; meets all statutory deadlines and usually meets other deadlines; reports are substantially complete with few errors, and require few extensive changes due to omissions or lack of analysis.[5]
>
> Another stated:
> Usually understands most facets of producing a commodity and usually understands economic and market factors operating within a commodity sector; with few major exceptions, non-investigative reports, Summaries of Trade and Tariff Information, trade information monitoring system, correspondence and other output reflect up-to-date data (changing conditions in assigned commodities especially concerning technology, uses, volume of imports

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4. *John DePauw* v. *U.S. International Trade Commission,* 782 F.2d 1564 (Fed. Cir. 1986) at footnote 2.

5. Id. at footnote 3. See also Appendix C for more material on ITC standards pertinent to the instant case.

and exports, volume of production, and tariff treatment and history) and address economic, trade and tariff issues; output requires few extensive changes in data or content.

The lower court admitted that these standards barely passed muster. This admission not only patently disregarded the basic question of what standards do pass muster, but also by extension leaves the door open for the U.S. government, and for that matter state and local governments following the federal lead, to blatantly apply nonobjective standards in the evaluation of job performance.

Continuing in its reasoning on the ITC standards that "pass muster (though perhaps not with flying colors)," i.e., barely pass muster, the Appeals Court stated that first those [ITC] standards were close parallels to those applicable in *Jackson's* case (770 F.2d at 1055), similarly governing the work of a professional employee who had to expect to be treated as a professional and whose work necessarily called for some subjective evaluation. The standards here, like those in *Jackson,* "are sufficiently objective and precise in the sense that most [professional] people will understand what they mean and what they require. . . ."

In this reasoning the Appeals Court is clearly begging the question. An employee, especially a professional one, must work under objective standards that measure his or her performance. The ITC clearly did not have such standards and the Appeals Court acknowledged this and tried to obfuscate in its opinion. Specifically, the standards that defined the petitioner's tenure at ITC were:

Standard 1:

Usually identifies, anticipates, takes action (marginal); consistently identifies, anticipates, takes action (commendable);

Usually meets requirements (marginal); demonstrates knowledge and ability to satisfy requirements (commendable);

Meets all statutory deadlines and *usually* meets other

deadlines (marginal); meets all statutory deadlines and completes nearly all assignments on schedule (commendable);

Reports are *substantially* complete requiring few extensive changes (marginal); reports contain no major errors/omissions, require little rewrite (commendable);

Standard 2:

Usually understands most facets of commodity (marginal); demonstrates technical understanding (commendabale);

With few major exceptions, reports are up to date and address issues (marginal); with few major exceptions, reports are up to date and address issues (commendable).

The standards involved in this case make abundantly clear the problem of lack of objectivity. The distinctions between the standards exist in the mind of the beholder; a neutral third party simply cannot distinguish the standards for commendable and marginal performance. Now, of course, the issue is whether the petitioner's performance met the marginal level, but the inherent subjectivity of the standard makes that determination as difficult as the distinction between marginal and outstanding performance.

More to the point, is that the Appeals Court in the instant case ignores its own decision regarding objectivity of standards set down in *Wilson.*[6] Specifically,

> ...the objectivity issue was reviewed in *Wilson,* a case consolidated with *Jackson* v. *Environmental Protection Agency.* Both cases involved demotion for unacceptable performance. Together they helped to define the minimum requirements of performance standards. The legislative history of the Reform Act generally and of Chapter 43 in

6. Cited above, 770 F.2d 1048 (Fed. Cir. 1985).

particular reveals a conscious desire on the part of Congress to reject the previous system by which the Government evaluated its employees, and to create a new scheme resting on a different foundation. The old system, most recently promulgated in the Performance Rating Act of 1950...provided for summary evaluation of employees' performance under three ratings: satisfactory, unsatisfactory or outstanding. This system ultimately proved ineffective as a management device because (1) it was too subjective to differentiate adequately between competent and incompetent employees, and correspondingly (2) it injected into the appraisal system an element of subjectivity over which any employee could contest the Government's action in lengthy administrative and judicial proceedings.

...

[C]ongress intended in the Reform Act to initiate and continue a system that would assure that competent employees would be retained and unsatisfactory employees removed from their positions, while keeping to a minimum the need for protracted administrative and judicial intervention resulting from inadequate standards and appraisals....

...

The Board recognizes, as it should, that the "objectivity" requirement in the statute promotes the purposes of the Reform Act by informing employees and their supervisors, as precisely as feasible, of the level of proficiency necessary to achieve a given rating. This objective appraisal system serves to deter the arbitrary personnel actions and protracted appeals which Congress found to be so frequent under the earlier, subjective standard system....

We wholly agree with the Board's formulation, as set forth in *Siegelman* and other Board decisions, that under the statute's objectivity requirement, standards must be reasonable, sufficient in the circumstances to permit accurate measurements of the employee's performance, and adequate to inform the employees of what is necessary to achieve a satisfactory or acceptable rating. If the standards

satisfy this test, then they further the congressional purpose. Employees will be spared arbitrary ratings and adverse personnel actions grounded purely on subjective impressions. Supervisors will feel freer to propose personnel actions against unsatisfactaory employees — based on such objective standards — confident that they will have made a verifiable decision, and the employee will not be retained because the evaluation process itself was arbitrary or because the agency is reluctant to defend inevitable and protracted appeals.

Petitioners (Wilson and Jackson) do not reject the Board's general interpretation of the objectivity requirement. However, they urge further that, to reach these goals, the Government must provide its employees with precise quantitative or numerical standards. They contend that only such mathematical or percentage standards can completely remove subjective judgment from the employee evaluation process, as Congress intended. We cannot agree that this refinement is mandatory.

The statutory terms "accurate evaluation," "objective criteria," and "to the maximum extent feasible" — taken together with Congress' stated objective (in the legislative history) to obtain standards that were "adequately defined" — all suggest that Congress desired standards sufficiently specific that compliance *vel non* with those standards could be verified in the particular instance by others than the official appraisers of the employee's performance. A...standard should be sufficiently precise and specific as to invoke a general consensus as to its meaning and content. But the legislative language does not suggest any necessary requirement for numerical measurement, and it is not difficult to think of many positions in which such strictly quantitative criteria would be unrevealing, bizarre, or counter-productive.

Furthermore, Congress clearly expressed its intention to allow the agencies "great flexibility to choose or develop their own systems. Agencies should determine what type of performance appraisal methods best suited their

> needs."...This strong emphasis on "great flexibility" for the agencies run directly counter to the rigidity of an obligation for numerical or quantitative standards. Of course, the agency must always live up to the statutory demand that the standard allow for reasonably accurate measurement of performance and protect employees against arbitrary treatment....

The Court went on to apply the law to Mrs. Wilson, an operations supervisor responsible for fourteen employees of an SSA district office. The critical element at issue was that she direct work activity by issuing orders and instructions on what, how, and by whom action should be taken. At the minimally acceptable level, the standard designated the necessary performance to be: "Coordinates, controls, and directs activities of subordinate staff to insure adequate service to the public by appropriate management principles. Assignments and instructions to staff are hastily made and sometimes misunderstood. Direction of work activities is occasionally effective in achieving objectives." On the basis of the standard, the Board had determined that Mrs. Wilson was properly demoted for failing to cure backlogs and failing to review certain SSA claims. The presiding official noted that although the standard was "almost no standard at all," but pointed out that the standard required Mrs. Wilson to "insure adequate public service" by the employees in her charge, a standard sufficient to sustain the demotion. The Court disagreed:

> We rule, however, that the standard the Board sustained cannot be upheld as within the requirements of the Civil Service Reform Act....The standard as stated is, however, so vague and inexact that it is impossible to apply in a verifiable fashion or to discover the level of proficiency which the SSA actually intended by the phrase. It is exactly the type of standard that left Wilson open to arbitrary appraisal in contravention of the Reform Act.
>
> The same criticism applies to that portion of the standard that requires that Wilson's direction of her subor-

dinates' work be "occasionally effective." The word "occasionally" indicates less than a majority of times, but we cannot be certain or even reasonably sure how much less in this or any instance. Moreover, the SSA placed itself in the awkward position of having to prove a negative; in order to show that petitioner was not occasionally effective, it must, because of the imprecision of "occasionally," prove that she was never effective...Similarly, the work "hastily"...is so amorphous in this context as to forestall any general consensus, either as to what it means or as to whether there has been compliance with it.

...

We conclude in Wilson's appeal that the SSA abused its discretion, by violating the Reform Act, when it promulgated the performance standard setting forth the minimally acceptable level of proficiency expected of Wilson in the critical element concerning the management of her subordinates. The converse is that the performance standard on the basis of which the SSA demoted Wilson did not properly inform her of what was required to achieve an unacceptable performance rating. That standard was not valid because it failed to comply with the statutory mandate. Accordingly, the agency's decision to demote Wilson, based on that invalid standard, cannot be sustained.

Juxtaposed with Wilson's case was that of Sid Jackson, an environmental scientist for EPA who wrote reports of workshop meetings with state and local officials involved in issuing permits under EPA standards. Jackson's critical element was to "Concisely define information needed for developing comprehensive reports. Establish format for obtaining and presenting information. Identify all available information resources and coordinate information development with other program offices. Verify accuracy of information presented. As

example, write, edit, and publish technical newsletter on relevant Agency and state permit assistance activities." The implementing standard required that "Draft reports are completed in a timely manner, address all relevant issues, and require minimum revisions. Information developed and reported is coordinated with other relevant program offices. Recognize, report and recommend solutions to potential problems." It was charged that Jackson's reports were often late and required extensive revisions.

The Court sustained the standards, commenting that:

> The performance standard relating to Jackson's preparation of reports requires that they be completed in a timely manner, that they address all relevant issues, and that they require minimum revisions. These are sufficiently objective and precise in the sense that most people will understand what they mean and what they require — and Jackson could adequately determine (in the words of the presiding official) "whether the standard [was] attained and exceeded." Jackson correctly notes that this standard allows for some subjective judgment on the part of his evaluators. This is particularly true of the portion prohibiting more than minimal revisions. But we cannot conclude, as does Jackson, that this is *per se* a fatal flaw in the standard. Jackson's position required that he write reports as a professional: to argue that he should be judged in a purely mechanical way, as by the number of pages he wrote (or the bare number of errors committed, as if all errors were equal), is absurd. As the Board has recognized, some tasks may be rated only with a certain modicum of subjective judgment. *See Siegelman, supra,* at p. 29 ("[W]ork at appellant's level is not susceptible to the kind of mechanical judgment-free rating which she argues is required"). Congress recognized that these situations would exist when it provided in 5 USC 4302(b)(1) that the objectivity requirement must be met only "to the maximum extent feasible." The challenged standard as a whole strikes us as within the statute, adequately gauged and inform-

ative to Jackson, and readily attainable.

Moreover, EPA did not base its action solely on the performance standard. The standard provided the initial impetus for placing Jackson on an individual development plan. At that point, EPA instructed him on precisely how he could achieve a satisfactory rating. The standard was thus fleshed out and implemented in detail.

. . .

. . .

The performance standard reasonably informed Jackson of what, how and when he was to write. When he failed to meet EPA's expectations, he was informed of the specific areas in which he needed improvement and of the specific tasks by which he could satisfy EPA's concerns. Jackson then knew very precisely the level of proficiency he would have to achieve to retain his position. When he failed to complete those tasks in a satisfactory manner, EPA could properly take action.

The standards used in DePauw's case were similar to Wilson's to the extent that they were poorly defined. Yet they also had some similarity to Jackson's standards which, though not well defined, were supplemented through specific directives in a performance improvement plan issued to Jackson after he was warned of unacceptable performance. Recognizing the deficiencies in the standards and its arguments, ITC urges that "Though written manuals, supervisory counseling, peer review and, finally, in the enumeration of methods for improving his performance, ITC gave content to the standards as they would be applied to the varying nature of petitioner's work.[7] ITC cites pages 113-14 of the hearing transcript. A review of the cited sections of the transcript shows nothing about counseling sessions providing supplemental standards or an enumeration of means by which DePauw could improve his performance. The cited

7. Resp. Brief, at 46.

reference appears to concern itself principally with a style manual, referred to in general terms without any information which would delineate how the style manual supplemented DePauw's performance standard. The reference in ITC's Brief, in its entirety, is:

> Q. Mr. Trezevant, in addition to performance and production standards for commodity industry analysts, are there other specific written instructions for performing your duties?
>
> A. Yes. There is some instructions for particular types of their duties. For example, there is a manual that has been prepared to be used in the preparation of summaries of trade and tariff information. It's the standard manual of instructions.
>
> There are also instructions relating to something they call MIBRS, Monthly Import Business Revew articles. In addition to that, when we have certain kinds of assignments such as investigations on generalized system preferences investigations, we prepare written instructions to give to the analysts for their guidance.[8]

A review of the documentation preceding the removal shows some rather absolute guidance to DePauw and perhaps that is what ITC relies upon as an extension of the performance standards. In the interim appraisal, DePauw's supervisor told him that he should do his assigned work so that "The data should be free of errors and complete in all ways, as defined in the summary manual."[9] That is simply not of much help in defining the minimum standard for retention in the civil service, for even the outstanding level of performance as defined in the standard allows for reports which permit non-major errors and omissions and require "little rewrite."

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8. Ibid.

9. Resp. App. 30.

It is tempting for the Government, which quotes *Siegelman* and misinterprets *Wilson* and *Jackson,* to suggest — as did the Arbitrator — that because DePauw was not a "factory worker" the standards need not be particularly objective. Mr. Siegelman was not a factory worker; he was a GS-14. DePauw was GS-11 with a doctorate in economics. He was not a factory worker. But that does not dispose of the issue relative to objectivity of standards. The simple answer is that the Congressional mandate of objectivity in standards was Government-wide. Had Congress decided that standards should only be objective for blue collar workers, it could have limited the system to wage grade employees or employees whose tasks were below certain grade levels. Quite the contrary was true, however, for in recent amendments to the Reform Act, Congress made clear that standards were to be objective for senior managers. 5 USC 4302a.

In its opinion, the Appeals Court chose the *Jackson* case as its guide for suggesting that the ITC standards barely pass muster. Yet, in doing so, the Court is clearly in error. There was no testimony by Ms. Hagelin. The Court nonetheless stated in its opinion that

> His immediate supervisor after reassignment (Ms. Hagelin) gave him (in her interim appraisal of February 1984) very specific criticisms and a list of what was expected from him. She told him that she would be available, at any time during his improvement period, to discuss problems with him and urged him to work closely with her.

Since Ms. Hagelin was unavailable for testimony, she could not be challenged by cross examination on this point as she most assuredly would have been. By citing evidence that does *not* exist, the Court clearly is in error. Not only do the ITC standards barely pass muster, but at the minimum, so does that of the Appeals Court reasoning. To let this case stand on the basis of such specious and perhaps erroneous legal reasoning does a grave disservice to this petitioner, but more importantly to many government workers who might find their jobs in jeopardy due to lack of objective and reasonably precise performance standards.

The question of standards is not at all unique to the ITC. In fact, a 1985 report by OPM commented, at pp. 7-8:[10]

> We estimate that about 55 percent of performance plans in use, Governmentwide, are deficient in some respect — either the elements or standards or both are deficient. . . . The biggest weakness of both elements and standards was lack of clarity; both tended to be expressed as vague generalities, and this was particularly true of standards. When elements are vague, telling whether the work expectations have been achieved is anyone's guess. When performance standards are vague, determining *how well* these expectations were achieved is equally subjective. Given this situation, a performance rating can not be tied to anything tangible. Since supervisors, no doubt, find it easier to praise employees than to criticize them, poor performance plans may open the door to inflated ratings. And inflated ratings are a concern because (1) the truly superior employees are lumped in with everyone else and (2) poor performance is not dealt with.

OPM's critique suggests that employees benefit from vague standards, but those whose appeals are lodged with the Board may disagree. Poor standards do not allow reasonable measurement of work. Given the deference that the Board pays to agency standards and the very small amount of evidence needed to support an adverse performance action, employees need standards that provide clear measures both to ensure acknowledgement of their achievements and to avoid unreasonable performance-based actions. The OPM Report implied as much in later discussion, at p. 13:[11]

> Of those few employees who get negative personnel actions (about 1%), we rated about 69 percent of their elements and 68 percent of their standards "Less than

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10. Cited in Broida, *op. cit.* p. 549.

11. Ibid.

> Satisfactory," compared to 37 and 42 percent for the employees who received positive actions. Poor performance plans, of course, do not cause negative personnel actions or poor performance. Nevertheless, the evidence suggests that poor plans do not give poor or marginal performers the help they need to improve.

It is no wonder that the petitioner in the instant case prays for relief.

The petitioner does not and has not suggested that standards must comprise specific numerical measurements; however, the absence of precise quantifiable standards does not excuse standards that so broadly stated and so lacking in differentiation between levels that it is impossible to say when an employee has met or exceeded the marginal level of performance without extreme deference to subjective managerial interpretation of both the employee's work and the standards against which work is to be measured.

Performance standards in fact and in law define the employee's tenure in the Government. Once the employee is given a warning about unsatisfactory performance, his whole career is determined by measurement of his performance over the next 30-90 days. Given the realities of the workplace — the fact that a manager has already determined performance to be unsatisfactory and the existence of a notice warning the employee of future adverse action — a diffuse or subjective standard applied to a person whose work may consist of written work product — as much subject to critique or revision as a lawyer's brief or a judge's decision — permits arbitrary, incontestable decisions removing employees from their careers. Congress desired to expedite removal of unproductive employees. But Congress intended there to be adequate protections in the process — the most important of which is the objectivity of the underlying standard. Since that requirement was not met in the instant case, the Court of Appeals decision must be reversed.

Supreme Court, U.S.
FILED
JUL 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1782

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN DEPAUW, PETITIONER

v.

UNITED STATES INTERNATIONAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that substantial evidence supported an arbitrator's decision upholding the International Trade Commission's determination that petitioner's work performance was unacceptable and the Commission's dismissal of petitioner from federal employment.

2. Whether the court of appeals correctly held that the performance standards under which petitioner was evaluated were sufficiently objective.

TABLE OF AUTHORITIES

Cases:	Page
Adams v. *Department of Transportation*, 735 F.2d 488	7
Schapansky v. *Department of Transportation*, 735 F.2d 477, cert. denied, No. 84-258 (Nov. 13, 1984)	7
Weirauch v. *Department of the Army*, 782 F.2d 1560	8
Wilson v. *Department of Health & Human Services*, 770 F.2d 1048	6, 7
Statute:	
5 U.S.C. 4302(b)(1)	5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 782 F.2d 1564. The opinion of the arbitrator (Pet. App. B1-B17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1986. The petition for a writ of certiorari was filed on April 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. Petitioner was first employed by the United States Tariff Commission—which became the United States International Trade Commission in 1974—in 1970 as a GS-11. He was promoted to GS-12 in three months and did satisfactory work until 1981. At that time, "the quality of his work and productivity began a downward spiral" (Pet. App. B3). His supervisor, using a set of performance standards developed in accordance with a performance appraisal plan that had been approved by the Office of Personnel Management (OPM), rated his work as "minimally acceptable" in June 1982. In November 1982 petitioner received an interim performance rating of "unacceptable." He agreed to a reassignment to another division under a different supervisor, Edith Hagelin, with a voluntary downgrade to GS-11, in April 1983. *Id.* at B3-B4.

In his position as a Commodity-Industry Analyst, petitioner's work was evaluated according to his performance on the four critical elements of that job.[1]

---

[1] The four critical elements of the job are (Pet. App. B3):

1. Prepare and assist in the preparation of commodity investigations, analytical reports on findings and special project studies.

2. Develop and maintain technical and economic data on assigned commodities in order to identify and assess trade and tariff issues.

3. Advise division management on international trade matters and domestic industry issues.

4. Clearly and accurately communicate in written and/or verbal presentations.

Performance standards were developed describing "minimally acceptable" and "commendable" performance on each critical element. The performance standards for petitioner's job are reprinted at Pet. App. C1-C9.

In his first interim performance appraisal in February 1984, petitioner was given a rating of "unacceptable" by Hagelin. As the arbitrator noted, Hagelin's "whole report was replete with serious criticisms of [petitioner's] work" (Pet. App. B5). The evaluation of his performance on the first critical element, preparation of commodity investigations, "was severely condemnatory" (*ibid.*). The evaluation of his performance on the second critical element, development of data on assigned commodities, was also highly critical and included examples of more than 30 errors petitioner had committed. Petitioner was warned that his performance would have to improve within the next 60 days—the "opportunity period," which was extended to 91 days—or he would be demoted or removed. He was given a written list enumerating ways in which he could improve his performance (GX 2), and Hagelin urged him to work closely with her to improve his performance (Pet. App. B5). Petitioner admitted that he was "having difficulties with his job" (GX 19).

Petitioner's second-level supervisor, Walter Trezevant, testified at the arbitration hearing that he worked closely with Hagelin on petitioner's case during the opportunity period and that he met with petitioner nearly every other day (Tr. 123-125). Nevertheless, petitioner's work continued to be deficient (Tr. 123-130; GX 3). Near the end of the opportunity period, petitioner went on sick leave, from which he never returned.[2]

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[2] Petitioner explained his absence by sending the Commission a letter from a psychiatrist stating that petitioner had been under his care for several months for depression and a letter from an internist stating that petitioner had been under his care for treatment of severe migraine headaches (Pet.

2. In June 1984 the Commission issued a proposal to remove petitioner on the basis of his continued unacceptable performance. A hearing was held in August 1984 and the Commission notified petitioner that it would separate him on November 9, 1984. Petitioner filed a grievance which was denied by the Commission in December 1984. Petitioner then requested arbitration, contending, inter alia, that the Commission's decision to remove him was not supported by substantial evidence and that the performance standards under which he had been evaluated were defective.

After a hearing on April 15 and 16, 1985, the arbitrator rejected petitioner's claims (Pet. App. B1-B17). Two witnesses testified for the Commission, including Trezevant, who "was fully prepared to testify in depth about [petitioner's] work record and did so, credibly and at great length" (*id.* at B11). In addition, "a substantial body of documentary evidence offered by the Commission" was received as evidence (*ibid.*). Petitioner "offered no independent evidence whatsoever in support of his case-in-chief, as to his affirmative defense, or as to any rebuttal" (*ibid.*). The arbitrator concluded that the Commission's decision to remove petitioner was supported by

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App. B6). Petitioner subsequently submitted other letters from physicians to support his now-abandoned theory that he had a handicapping condition that the Commission should accommodate. His psychiatrist described him as suffering from " 'depression, extreme anxiety and great emotional instability,' as well as 'obsessive behavior' that is 'typical of this type of personality and emotional disorder' " (*id.* at B8). Other doctors stated that he suffered from "classic" migraine headaches "that usually lasted 24 to 48 hours and rendered [petitioner] unable to work during that period," and that he was being treated with an experimental drug (*id.* at B7-B8).

substantial evidence. Indeed, the arbitrator agreed with the Commission that "the decision to terminate [petitioner] was 'not merely grounded upon substantial evidence, but, rather based upon overwhelming evidence' " (*id.* at B12-B13).

The arbitrator also rejected petitioner's argument that the performance appraisal system under which he had been evaluated was defective. He noted that 5 U.S.C. 4302(b)(1) provides that agencies are required to establish performance standards "which will, *to the maximum extent feasible*, permit the accurate evaluation of job performance on the basis of objective criteria" (Pet. App. B13 (emphasis by the arbitrator)). The arbitrator rejected petitioner's contention that the performance standards developed to describe the critical elements of his GS-11 position were not defined in a sufficiently objective manner, stating that petitioner "did not have a routine job on a factory assembly line," but instead a position that "did not lend itself to the establishment of judgment-free, numerical standards" (*ibid.*). The arbitrator concluded that the OPM-approved system "was adequate by any standard" (*id.* at B14).[3]

3. The court of appeals affirmed (Pet. App. A1-A7). It first rejected petitioner's claim that the performance standards are not sufficiently objective. The court noted that petitioner "had to expect to be treated as a professional * * * whose work necessarily called for some subjective evaluation" (*id.* at A4). The performance standards under which he was evaluated " 'are sufficiently objective and pre-

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[3] The arbitrator added that the Commission had acknowledged that petitioner is now ill and had provided him with information on disability retirement (Pet. App. B17). See note 2, *supra*.

cise in the sense that most (professional) people will understand what they mean and what they require,' " the court concluded (*ibid.*, quoting *Wilson* v. *Department of Health & Human Services*, 770 F.2d 1048, 1055 (Fed. Cir. 1985)). The court added that petitioner's "[supervisors] filled him in, in detail, as to exactly what was demanded of him" (Pet. App. A4). It held that "[t]he performance standards * * * [meet] the statutory criteria" (*id.* at A5).

The court also rejected petitioner's argument that no substantial evidence showed that his performance had been unacceptable. The court noted that the Commission submitted "(a) documentary evidence consisting of Ms. Hagelin's detailed and specific interim appraisal of petitioner's work (in February 1984) as well as the detailed removal charges found as true by ITC, and (b) oral testimony of Mr. Trezevant * * * summarizing with specific examples the low-level of petitioner's work" (Pet. App. A5 (footnotes omitted)). The court, noting that petitioner did not even attempt to rebut the Commission's evidence, concluded that the arbitrator had correctly decided that the Commission had presented "overwhelming evidence" in support of its decision to terminate petitioner (*id.* at A5-A6).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner contends that under the court of appeals' decision "a federal employee may be removed from his job on the basis of detailed charges without evidence" (Pet. 3). Petitioner has grossly mischaracterized both the holding of the court of appeals and

the evidence presented to the arbitrator. The Commission presented extensive documentary evidence detailing petitioner's inadequate performance plus testimony from Trezevant, whom both the arbitrator and the court of appeals concluded was thoroughly familiar with petitioner's case.[4] As both the arbitrator and the court concluded, the evidence of petitioner's inadequacies was not merely substantial but overwhelming. The Commission also presented detailed charges, which should have assisted petitioner in presenting a defense, but petitioner presented no rebuttal evidence.[5] In these circumstances there is no warrant for this Court to review the court of appeals' decision that the Commission's decision to remove petitioner is supported by substantial evidence.

2. Petitioner also contends that the performance standards under which he was evaluated are not sufficiently objective because they "contain[] the * * * vague words 'usually,' 'few,' and 'most'" (Pet. 6). But, as the Federal Circuit has held, Congress intended federal agencies to have flexibility in devising performance standards, and the use of precise numerical standards to describe adequate performance in many positions would be "unrevealing, bizarre, or counter-productive" (*Wilson*, 770 F.2d at 1052). While the standards developed to describe adequate performance in the critical elements of petitioner's

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[4] The arbitrator noted that Trezevant, who was subjected to cross-examination, was the head of a division with only 17 employees (Pet. App. B11).

[5] The Federal Circuit has repeatedly concluded that failure to rebut a prima facie case is fatal to a dismissed employee's case. *Adams* v. *Department of Transportation*, 735 F.2d 488 (1984); *Schapansky* v. *Department of Transportation*, 735 F.2d 477 (1984), cert. denied, No. 84-258 (Nov. 13, 1984).

job attempt to define objective standards of performance, it would be absurd for them to be phrased, as petitioner argues they must, in terms of absolute quantities. Moreover, as the Federal Circuit has held (*Weirauch* v. *Department of the Army*, 782 F.2d 1560, 1564 (1986)), performance standards may be reviewed in conjunction with the counseling an employee received to determine whether the employee adequately understood what was expected of him. In this case, as the arbitrator and the court of appeals concluded, petitioner knew what was expected of him but nevertheless performed inadequately for an extended period. There is, therefore, no warrant for review of the court of appeals' determination that the performance standards under which petitioner was evaluated were sufficiently objective.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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